



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO. 12 OF 2018

ELIZABETH JERONO YATOR.....PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA.....1ST DEFENDANT

CLEVERLINE AUCTIONEERS.....2ND DEFENDANT

RULING

INTRODUCTION

What is before the court is the application dated 7th December 2016. The applicant seeks orders for an injunction against the selling, transfer or alienating of the land parcel known as ELDORET MUNICIPALITY/BLOCK 9/912. The Application was filed together with a plaint seeking declaratory orders that the power of sale be declared unlawful and that her rights as a consumer were breached.

APPLICANTS' CASE

The applicant submit that the matters raised in this suit relate to post judgment conduct of the parties and the state of affairs occasioned by the defendants and therefore do not fall within the confines of res judicata. The applicant maintains that the 1st defendant had judgment and instead of executing it commenced a bank transaction based on the judgment debt.

The 1st defendant issued an offer letter to the plaintiff on 28th April 2015 for a sum of Kshs. 3,423,700 which was repayable in instalments of Kshs. 86,939 in instalments for a period of 60 months. The issues of the legality of converting the judgment debt into a loan contract, observance of banking practices and seeking to exercise a statutory power of sale, are issues that arose after the suit was concluded. She submits that the same cannot be termed as res judicata as they were not raised during the suit.

The plaintiff further submitted that she had established a prima facie case with a probability of success. She submitted the defendant failed to establish that a valid charge or further charge was registered at the lands office pursuant to the letter of offer dated 28th April 2015 in the register of the land parcel known as ELDORET MUNICIPALITY/BLOCK 9/912. The defendant has no power of sale as no relationship of a chargor and chargee exists where there is no charge executed, attested to and registered pursuant to an agreement or further charge. The offer letter is a bar to any exercise of statutory power of sale.

The charge dated 8th August 2012 and cannot support the exercise of statutory power of sale as the amounts that are the subject of the current statutory power of sale arise out of a contract that was concluded in 2015 and thus based on the doctrine of past consideration the debts cannot be recovered. By converting the judgment they are deemed to have forfeited the right to sell the charged security.

Allowing the defendants to exercise any rights under the charge would be a violation of the law as it contains a clause of 29% interest p.a which is illegal. The applicant also submitted that there is no valid guarantee and indemnity as the guarantee instrument does not have a principal debtor named in its schedule and it is not attested to.

The applicants further submitted that there were no withdrawable finances disbursed to the plaintiff which can be described as a loan repayable to the 1st defendant.

The notice dated 12th April 2016 is not a statutory notice as it relates to a charge dated 8th August 2012 which is not valid. The debt the subject of it was resolved by the judgement in the suit. The plaintiff never negotiated the interest rates that were quoted and the defendants had no authority to increase their rate of banking tariffs. The applicant further denies that the notice was duly served.

The plaintiff based his application on the fact that the 1st defendant did not comply with the provisions of *Section 96 and 97 of the Land Act*

and further, that the defendants failed to comply with *Section 98* of the *Land Act* and the auctioneers rule by failing to issue a valid redemption notice and a notification of sale. No value of the property has been indicated in the notice of sale or redemption notice. She also faulted the certificate of service for not stating how the auctioneer was able to identify the debtor.

The plaintiff submitted that no amount of monetary compensation can be adequate as a remedy as the charged property is her home.

DEFENDANTS' CASE

The defendant submitted that the suit is *res judicata* as the parties in this suit entered into a consent judgment over the subject matter in ELC case number 17 of 2015. The plaintiff herein admitted to the debt and there was an agreement on the liquidation of the same. The defendants further submitted that their conduct was based entirely on the consent which resulted in the plaintiff being given a new lease of life by being issued with a new offer letter and the defendant forfeited its right to foreclose at the moment. The plaintiff entered into a consent judgment and thus is deemed to have admitted the debt was lawful and the charge valid. The plaintiff relying on the case of ***Low Investment Limited vs National Bank Limited and 3 others [2003] eKLR***, submitted that once a consent judgment is filed and payments made in fulfilment of the consent then she is deemed to have admitted the debt is lawful and the charge existed.

The present suit is an attempt to avoid the consequences of the consent freely entered into by the parties and the plaintiff is estopped from founding a suit on matters admitted to in a court of law. The plaintiff being guilty of failure to pay a debt that she admitted before the court is unworthy of any injunctive reliefs.

The applicant is guilty of non-disclosure having failed to disclose that the current dispute arises from the applicants' failure to perform the terms of the consent dated 19th March 2015. This is what prompted the defendants to start the process of realizing the consent order. The applicant has approached the court with unclean hands.

The respondent submitted that the offer letter issued on 28th April 2015 does not amount to converting a judgement debt into a loan contract. The applicant entered into a lawful agreement to create a legally binding transaction to give meaning to the consent. The consent order assigned the debt to the plaintiff substituting her as a guarantor and making her the principal. The consent never extinguished the charge as a charge can only be extinguished by discharge, redemption or sale. The transaction is covered by the former charge instrument hence there was no further charge registered after the transaction. The purpose of the offer letter was to give effect to the consent order by way of a new lease of life.

As per clause 10.1 of the charge instrument, the charge instrument dated 8th August 2018 was fully operational after the consent was recorded. Further, the statutory notice dated 12th April 2016 is valid for the purposes of section 90 of the *Land Act 2012* as the charge dated 8th August 2012 had not been extinguished at the point where the respondent wanted to exercise its statutory power of sale. The statutory notice was issued by a duly registered attorney as provided for by the *Land Registration Act* and failure to attach the authority does not render the affidavit invalid. The respondent relied on the case of ***Kenya Commercial Bank v Suntra Investment Bank Ltd. Suit No. 380 of 2013***. The statutory notices were sent to her last known postal address and it is upon service of the notices that the applicant admitted the debt in writing and promised to pay the same.

The respondent submitted that the property was lawfully valued. The valuation report relates to the suit property and the variance of dates should not be capitalized on to defeat justice as those are typographical errors. The respondents complied with the requirements of the *Land Act* as the redemption notice was issued and served on 27th September 2016.

The respondent further submitted that the applicant is guilty of laches for failing to file the suit within reasonable time including the last newspaper advertisement made on 22nd September 2016. The suit is an afterthought after the plaintiffs' proposal on payment vide a letter dated 18th November 2016 was rejected.

The respondent submitted that the applicant is seeking injunctive orders and therefore the application should be subjected to the principles established in ***Giella v Cassman Brown***. The plaintiff failed to prove that she has a *prima facie* case and will suffer irreparable damage. The balance of convenience is in favour of the respondent as the applicant has not repaid the loan and does not intend to.

ISSUES FOR DETERMINATION

- a) Whether the suit is *res judicata*
- b) Whether the applicant has satisfied the principles for an injunction to be issued.

WHETHER THE SUIT IS RES JUDICATA

Section 7 of the *Civil Procedure Act* provides;

Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation:-

(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

The court needs to determine if the matter in issue has been in issue between the same parties before a court of competent jurisdiction. The matter in issue in this suit is the power of sale arising from a charge on the plaintiffs’ property herein referred to as the suit property. The plaintiff is seeking declaratory orders the effect of which is to have the power of sale declared unlawful and consequently an order that the charge be discharged in ELC No. 17 of 2015. The plaintiff sought prayers to have the auction of the suit property stopped and a declaratory order seeking that the charge registered against the suit property be declared illegal and void

Substantially, the matters in issue are the same; the plaintiff wants to stop the defendants from exercising their power of sale over the suit property in both suits. This issue was determined in ELC No. 17 of 2015 and to the said extent the suit is res judicata. The reason is that the declaratory order sought in the present suit is the root for the prayers sought. It is based on the power of sale arising from the charge on the suit property, an issue which was determined by consent i.e. the debt that arose from the financial facility that was granted to the 3rd defendant in ELC 17/2015. She admitted the debt and consented to pay.

WHETHER THE APPLICANT HAS SATISFIED THE PRINCIPLES FOR ISSUANCE OF AN INJUNCTION.

This being an application for injunction it follows that there are 3 limbs which must be satisfied for prayers to be granted;

- a) Whether the Applicant has a prima facie case with a probability of success**
- b) Whether the Applicant will suffer irreparable loss that cannot be compensated by damages**
- c) Whether the Balance of Convenience tilts in favor of the applicant.**

Whether the Applicant has a Prima facie case with a probability of success

The determination of this particular limb will serve to affect the main suit and may determine the main issues in the suit. There are issues that arise in the suit and these include;

- Whether the charge was extinguished.
- What was the purpose of the consent order?
- What was the purpose of the offer letter of 28th April 2015?
- Does the 1st Respondent have Statutory Power of Sale?

Whether the Charge was extinguished.

A charge is defined in section 2 of the Land Act as;

“charge” means an interest in land securing the payment of money or money’s worth or the fulfilment of any condition, and includes a subcharge and the instrument creating a charge.”

Section 85 of the Land Act gives provisions on how a charge is discharged. It provides:

(1) Subject to the provisions of this section, the chargor shall, upon payment of all money secured by a charge and the performance of all other conditions and obligations under the charge, be entitled to discharge the charge at any time before the charged land has been sold by the chargee or a receiver under the power of sale.

(2) Any agreement or provision in a charge instrument that is inconsistent with subsection (1) shall be void to the extent that it—

(a) purports to deprive the chargor of the right to discharge;

(b) seeks to fetter the exercise of this right; or

(c) stipulates for a collateral advantage that is unfair and unconscionable or inconsistent with the right to discharge.

(3) A chargee may provide, in a charge instrument, that a chargor who wishes to exercise the right to discharge the charge at any time before the expiry of the term of the charge—

(a) shall give one month's notice of the intention to discharge; or

(b) shall pay not more than one month's interest at the rate at which interest is payable on the principal sum secured by the charge or at any lesser rate which may be agreed, as well as paying all other money secured by the charge.

(4) A discharge of the whole or a part of a charge shall be as prescribed under this Act or any other law.

(5) For the avoidance of doubt, a discharge includes a re-conveyance and a re-assignment of charge or any other instrument used in extinguishing of interests in land conferred by charges.

Clause 10.1 of the charge instrument is to the effect that the charge is a continuing security and thus it was operational even after the consent order was recorded.

At no point in time did the applicant fulfil the conditions for the discharge of the charge. The parties did not agree that the charge had been discharged and the claim that the consent resulted in the discharge of the charge has no basis as was not part of the consent.

What was the purpose of the consent order?

The consent order served the purpose of admission of debt and laying out the terms of repayment. The applicant admitted the debt and proposed a payment scheme. It set the terms of repayment which included that there would be no interest charged. However, there was no provision as to the charge and therefore the charge was still in force. Further there was no penalty clause regarding any default and therefore it is sensible that the security for the payment was the pending charge.

What was the purpose of the offer letter of 28th April 2015?

From the facts and the submissions, the letter of offer served the purpose of substituting the applicant as the chargor and not the guarantor as she had previously been. This did not amount to converting a judgment debt into a loan of any sorts. I agree with the respondent's submissions that it was to give a new lease of life. It merely put the applicant in the position she occupied by virtue of admitting the debt owed and agreeing to make good on payments.

Does the 1st respondent have Statutory Power of Sale?

Statutory power of sale is a remedy available to the chargee under *Section 90* of the *Land Act*. *Section 90* provides;

90. Remedies of a chargee

(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

The applicant challenged the power of sale on the basis of past consideration and the alleged conclusion of the charge in 2015. Given that it is already established that the charge was never concluded then there is no room for the issue of past consideration to arise.

The applicant has not proven that there was payment on her part and it is evident that she defaulted and consequently the statutory notice dated 12th April 2016 is valid. Further, the notice is based on the charge of 8th August 2012 and consequently this invalidates the claim that there was no charge registered. The applicant is not right in her claim that there was a charge to be registered based on the offer letter of 28th April 2015. The applicant cannot deny agreeing to the interest rates yet her signature is on the letter of offer agreeing to the same.

The applicant contention that the guarantee is inchoate for purposes that there is no principal debtor is an attempt to escape the debt she admitted. The purpose of the consent was to convert the guarantor to the debtor. Further, the respondents' actions are based on the charge and the consent, it was already determined that there was a charge and that she admitted to debt and as a result she is obligated to fulfil the terms of the consent in the absence of which the 1st defendant is entitled to recover the sums paid to the defendant. It is my finding that the statutory notice dated 12th April 2016 is a valid notice for purposes of *Section 90 of the Land Act 2012*.

As aforementioned, the case is res judicata as the applicant seeks to stop the respondents from selling the suit property to recover the sums of money lent and in my opinion this issue was already settled in ELC 17 of 2015.

Whether the Applicant will suffer irreparable loss that cannot be compensated by damages

The plaintiff contended that the suit property is her home and the loss would be irreparable. I do however find that she converted the same to a commercial commodity and its loss can be made good by an appropriate award of monetary compensation.

In *Nahasho K Mbatia v Finance Company Limited (2006) eKLR* the court held;

“In any event, having charged the property, the Plaintiff converted it to a commercial commodity with a monetary value that can be easily ascertained. Its loss can always be made good by an appropriate award of monetary compensation. There is no allegation that the Defendant will not be in a position to meet such award. I hold, therefore, that the Plaintiff may not suffer irreparable loss.”

Whether the Balance of Convenience tilts in favor of the applicant.

The applicant has failed to show any goodwill by failing to attempt to settle the debt. It is an indicator that she will continue to default and deny the respondent the sums due to them. The Plaintiff has come to Court solely for purposes of defeating the Defendant's statutory rights in realization of its securities. She has failed to redeem her property as by law required. Therefore, the balance of convenience lies in favour of the Respondents.

The bottom line is that the applicant has failed to meet the threshold for an injunction and her application is accordingly dismissed with costs to the Respondents.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 3rd day of April, 2019.

In the absence of:-

Plaintiff/Applicant

Defendant/Respondent

And in the presence of Mr. Mwelem - Court clerk